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EXTRA-TERRITORIAL INHERITANCE TAXATION II¹

II. Established Tests of Extra-territoriality

In a passage already quoted,² Mr. Justice Field informs us that the only subjects of taxation are "persons, property, and business." "Whatever form taxation may assume", he continues, "whether as duties, imposts, excises, or licenses, it must relate to one of these subjects."³ Just how the learned Justice would classify inheritance taxes, he does not intimate. Very likely this species of fiscal exaction was not in his mind when he wrote. We have seen that other members of the Supreme Court have called them taxes on transfers or on successions, or on the privilege of transferring or of succeeding. In so doing they have sought to differentiate inheritance taxes from taxes on persons or taxes on property. Inheritance taxes may, indeed, be put in the same class as taxes on business, in that their levy is founded, not on the mere existence of persons or property, but on the happening of some special event in respect to persons and property. They belong in the general class of excise taxes, along with taxes on acts and occupations. This means that their levy and assessment may escape some of the restrictions with which recognized constitutional morality surrounds taxes directly on persons or on property. But it should not blind us to the fact that inheritance taxes, whatever their legal label, affect the interests of persons in respect to property, and that the underlying basis of their imposition is some relation of a person or of property to the political jurisdiction which seeks to profit from their presence.

To determine, therefore, what limits should be set to the desire to lay and assess inheritance taxes, it is well to have in mind the restrictions which courts have thought fit to place on other taxing enterprises which depend for their justification on the relation between the taxing authority and the persons or property within its grasp. For, if the power to impose an inheritance tax depends upon jurisdiction over a person or over property, it is useful to

¹For the first instalment of this discussion, see 20 Columbia Law Rev. 1-29 (January, 1920).

²20 Columbia Law Rev. 1.

³State Tax on Foreign-held Bonds (1872) 82 U. S. 300, 319.

know when persons and property are thought to be within the jurisdiction. Where the several handles or indicia of property are distributed over two or more jurisdictions, it is important to discover which one or ones of these handles or indicia are deemed of controlling significance. If we find that a jurisdiction is not justified in measuring a tax on persons domiciled within its borders by the value of property located elsewhere, some good reason must be given for a different attitude towards a tax by that jurisdiction on the passing of that property on the death of its owner. So, too, if taxes on one kind of a privilege must avoid modes of assessment which in effect take toll from property immune from direct levy, there is a strong presumption in favor of a similar attitude towards taxes on the so-called privilege of inheritance. Taxes on persons, taxes on property, and taxes on privileges must all meet the test set by the rule against extra-territoriality. A study of the applications of that test to other taxes than those on inheritances is a necessary preliminary to the consideration of the norms that should govern its application to inheritance taxation. Such a study may conveniently be made under the three heads of jurisdiction over persons, jurisdiction over property, and jurisdiction over privileges.

A. JURISDICTION OVER PERSONS

In a different sense from that in which we speak of a fool and his money, it is equally true that a person and his property are often parted. A man's house may still be his castle, but it is no longer his only treasury. Whatever the fictional merits of the maxim *mobilia sequuntur personam*, many movables are in fact located permanently in jurisdictions other than that in which their owner is domiciled. And the doctrine is now established that power to impose a tax on the owner as a person domiciled within the jurisdiction does not of necessity carry with it authority to measure that tax by chattels located elsewhere.

This doctrine is of recent origin. Mr. Justice Field was evidently not aware of it in 1874 when, in the opinion for a unanimous court in *The Delaware Railroad Tax*,⁴ he observed:

"As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but it is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule

⁴(1873) 85 U. S. 206.

which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt.

The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."⁵

Here plainly is the idea that a tax on a person, at least an artificial person, may be measured by property which is not taxable as property. Earlier the learned justice had observed that, if the tax were on the property of the corporation, there would be great difficulty in sustaining its validity, since it would in effect fall on property outside the state.⁶ But this difficulty, he seemed to think, might be readily side-stepped or hurdled by calling the tax one on the corporation itself. Whether the same rule would apply to a natural person, he did not reveal. Twelve years later, however, the Supreme Court allowed Mr. Justice Bradley to convey the intimation that it would. In support of the position that logs might be taxed where they were, though their owner lived elsewhere, the opinion in *Coe v. Errol*⁷ tells us:

"If the owner of personal property within a State resides in another State which taxes him for that *property as part of his general estate attached to his person*, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it *also*. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine, as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case and may be laid out of view."⁸

The italicized words in the quotation indicate that Mr. Justice Bradley had no notion of questioning the propriety of regarding chattels as attached to the person of their owner for purposes of taxation, even though this attachment straddled a state line. But this doctrine, even as to corporations, was not to remain unmodified.

⁵*Ibid.*, at p. 231.

⁶*Ibid.*, at pp. 229-231.

⁷(1886) 116 U. S. 517, 6 Sup. Ct. 475.

⁸*Ibid.*, at p. 524. Italics are author's.

In 1903, a majority of the Supreme Court became convinced, after a reargument, that the Fourteenth Amendment forbade Kentucky to include in the assessment of the Kentucky franchise of a Kentucky ferry company, the value of an Indiana franchise to run the ferry from the Indiana to the Kentucky shore. This was decided in *Louisville & Jeffersonville Ferry Co. v. Kentucky*.⁹ Chief Justice Fuller and Mr. Justice Shiras dissented, without announcing their difficulties. For the majority, Mr. Justice Harlan branded as a sacrifice of form to substance the contention that the Indiana franchise was not taxed by Kentucky but was merely considered for its enhancing influence on the value of the Kentucky franchise. "There is", he declared, "no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its situs in Indiana."¹⁰ This was said to be as much a violation of the Fourteenth Amendment "as if the state [of Kentucky] taxed the real estate owned by that company in Indiana."¹¹ The question whether the exaction might be justified as a condition imposed on the exercise of corporate powers in Kentucky was avoided by saying that neither the charter nor the tax statute made the payment a condition of the privilege of continuing to exercise the corporate functions.

Two years later, in *Delaware, L. & W. R. Co. v. Pennsylvania*,¹² only Chief Justice Fuller dissented from the conclusion that the Fourteenth Amendment required Pennsylvania to exclude from the assessment of the capital stock of a Pennsylvania corporation such part of its value as was contributed by coal mined by the corporation in Pennsylvania but then situated without the state. In the opinion of the court, Mr. Justice Peckham makes something of the concession of counsel for the Commonwealth that "it was never within the intent or the power of the legislature to impose a tax on tangible property when held outside of the territorial limits of the state"¹³ and that "the courts of Pennsylvania have held that tangible property, permanently located outside of the state, for the use and benefit of the corporation, and owned by it, is exempt from taxation under this statute."¹⁴ This concession,

⁹(1903) 188 U. S. 385, 23 Sup. Ct. 463.

¹⁰*Ibid.*, at p. 396.

¹¹*Ibid.*, at p. 398.

¹²(1905) 198 U. S. 341, 25 Sup. Ct. 669.

¹³*Ibid.*, at p. 355.

¹⁴*Ibid.*, at p. 354.

says Professor John Bassett Moore,¹⁵ qualifies the authority of the case, as affecting the power to tax foreign movables. But the qualification appears to be of a psychological, rather than a logical, character. It made the Supreme Court appear to differ with the Pennsylvania court, not on the general principle that extra-state chattels cannot be taxed to their owner in Pennsylvania, but only on the application of that principle to a tax based on the value of capital stock. But the Pennsylvania court had held squarely that neither the statute nor the conception of due process of law excluded this extra-state coal from participation in the valuation of the capital stock. As to the scope of the statute, the Pennsylvania court was the final authority. On the question of the Fourteenth Amendment, it was not the final authority, and it was flatly reversed by the Supreme Court. Very explicitly Mr. Justice Peckham declared: "The collection of a tax under such circumstances would amount to a taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."¹⁶

For authority, the opinion relies on the Louisville Ferry Case. No mention was made of any special power possessed by a state over its own corporate creatures. It was also a corporation that escaped from a tax on extra-state property in *Union Refrigerator Transit Co. v. Kentucky*.¹⁷ Here again it was assumed that the case was the same as if the owner of the property had been a natural person. The brief for the Commonwealth asserted the broad proposition that "the general assembly of the state of Kentucky had power and jurisdiction to provide that the personal property of all residents of that State, or of corporations organized

¹⁵"Taxation of Movables and the Fourteenth Amendment", 7 Columbia Law Rev. 309, 314 (May, 1907).

¹⁶(1905) 198 U. S. 341, 358, 25 Sup. Ct. 669. In concluding the opinion, the learned Justice observed:

"It is plain that in the case at bar the coal had lost its situs in Pennsylvania by being transported from that state to foreign states for the purposes of sale, with no intention that it should ever return to its state of origin. It was, therefore, as much outside the jurisdiction of the state of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the value of the franchise created by Indiana. Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the 14th Amendment, which prevents the taking of property in that way" (*Ibid.*, at pp. 360-361).

¹⁷(1905) 199 U. S. 194, 26 Sup. Ct. 36.

under the laws of that State, whether in or out of that State, should be taxed in that State."¹⁸ The contention was possibly narrowed when it was added later that "the right to tax the movable personal or tangible property of the plaintiff in error is not based on the principle that the laws of the State of the domicile of plaintiff in error protect such property, but on the solid ground that the laws of that State protect such domestic corporation, the person of the owner of such property, and, as a consideration for such protection, that State is entitled to tax all of its personal property, because it is a creature of the laws of that State."¹⁹ Here seems to lurk somewhat vaguely the idea that the corporation enjoys its existence as a matter of privilege, and must therefore submit to taxation on the basis of anything that adds to the joy of that existence and not ungratefully look a gift horse in the mouth. The point seems to be urged with sufficient definiteness and to be one which, if accepted, is so conclusive in favor of the tax that it must be regarded as negated by the failure of the court to discuss it. There is no hint in the opinion of Mr. Justice Brown that the corporation stood before the court in any different light from an individual.

In support of the decision the opinion adduces the Louisville Ferry Case and the Pennsylvania Case as precedents "which we think completely cover the question under consideration, and require the reversal of the judgment of the state court."²⁰ Professor Beale says that "the few authorities cited by the court as supporting the decision are easily distinguishable."²¹ This is certainly true of most of them, particularly those holding that chattels may be taxed where they actually are, and those interpreting statutes as not meaning to tax extra-state chattels. But it is less clearly true of the Pennsylvania Case. Indeed, as Mr. Justice Brown points out, "the decision in that case was really broader than the exigencies of the case under consideration require, as the tax was not upon the personal property itself but upon the capital stock of a Pennsylvania corporation, a part of which stock was represented by the coal, the value of which was held should have been deducted."²² Yet it would seem that Mr. Justice Holmes

¹⁸*Ibid.*, at p. 199.

¹⁹*Ibid.*, at p. 201.

²⁰*Ibid.*, at p. 209.

²¹*Jurisdiction To Tax*", 32 *Harvard Law Rev.* 587, 592 (April, 1919).

²²(1905) 199 U. S. 194, 210, 26 Sup. Ct. 36.

must have thought the Pennsylvania Case distinguishable, for his concurrence in that case did not prevent him from obliquely dissenting in the Union Refrigerator Case, in which he briefly remarks:

"It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed."²³

That there were grounds for doubt, as an original question, must be fully recognized. As Professor Beale says: "It is indeed difficult to prove that a practice which had prevailed in half the states of the Union for a century was contrary to due process of law."²⁴ Yet there seems substantially less footing for doubt in the Union Refrigerator Case than in the Pennsylvania Case. If the value of extra-state coal must be deducted from a tax on capital stock, *a fortiori* extra-state cars must be excluded from the list of personal property liable to assessment *eo nomine*. It is difficult to escape from the conclusion that the Union Refrigerator Case was not the innovator. The Jeffersonville Ferry Case can be distinguished, as Professor Moore points out,²⁵ because the property there involved was not a chattel but a franchise which was treated as an incorporeal hereditament. But the Pennsylvania Case seems to stand for all and more than does the Union Refrigerator Case.

It is perhaps unimportant to fix the birthday of the new doctrine, so long as we know that we have it with us. It is more pertinent to consider whether it stands on solid ground of reason as well as of authoritative judicial fiat. By "reason", as here used, is meant not logic but good sense. For the sins and virtues of the judicial deductions from the Fourteenth Amendment are seldom the product of faulty or of flawless logic. As has been wisely said of a major premise, you can get out of the Fourteenth Amendment all that you put into it. If, therefore, the result that extra-state property is protected from taxation is a desirable one to reach, it can for that very reason be readily deduced from the Fourteenth Amendment. This does not mean that every state statute which sensible men deem undesirable should be regarded by the courts

²³*Ibid.*, at p. 211.

²⁴32 Harvard Law Rev. 587, 592.

²⁵7 Columbia Law Rev. 309, 312-313.

as devoid of due process of law. The Fourteenth Amendment must allow state Solons a fair field for folly. Otherwise, the Supreme Court at Washington would become too important a branch of the legislature of every state. But none the less it is true that it is the undesirability of legislation which is the main source of failure to meet the judicial conception of due process of law. Why can a brick kiln be suppressed,²⁶ but not a gas plant?²⁷ Why did the Supreme Court allow a restriction of the working day in mines,²⁸ but not in bake shops?²⁹ Why do employment agencies³⁰ meet with more judicial tenderness than do trading stamps³¹ and bucket shops?³² What does the Supreme Court mean by its oft-repeated distinction between what is reasonable and what is arbitrary?³³ All the cases on the police power and the Fourteenth Amendment have in them this issue of the desirability of the result produced by the legislation in question. There is a point of undesirability beyond which legislation cannot pass without crossing the boundary of due process of law. The question in every case, as Mr. Justice Holmes has frequently pointed out, is one of degree.

Turning to the case in hand, there was no novelty in asserting the principle that a tax in excess of the jurisdiction of the taxing authority is a taking of property without due process of law. This is firmly established law. The only room for dispute in the Union Refrigerator Case appears in the application of the doctrine to the extra-state chattels of a domiciled owner. Is the nexus between property and person such that the property may justifiably be

²⁶*Hadacheck v. Sebastian* (1915) 239 U. S. 394, 36 Sup. Ct. 143.

²⁷*Dobbins v. Los Angeles* (1904) 195 U. S. 223, 25 Sup. Ct. 18. This decision was based on the special circumstances of the case.

²⁸*Holden v. Hardy* (1898) 169 U. S. 366, 18 Sup. Ct. 383, sustaining an eight-hour law.

²⁹*Lochner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, annulling a ten-hour law.

³⁰*Adams v. Tanner* (1917) 244 U. S. 590, 37 Sup. Ct. 662.

³¹*Rast v. Van Deman & Lewis Co.* (1916) 240 U. S. 342, 36 Sup. Ct. 370; *Tanner v. Little* (1916) 240 U. S. 369, 36 Sup. Ct. 379; *Pitney v. Washington* (1916) 240 U. S. 387, 36 Sup. Ct. 385.

³²*Otis & Gasman v. Parker* (1903) 187 U. S. 606, 23 Sup. Ct. 168.

³³For illustrations, see Mr. Justice Peckham in *Lochner v. New York*, (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539; Mr. Justice Day, in *Dobbins v. Los Angeles*, *supra*, footnote 27, *passim*; and in *McLean v. Arkansas* (1909) 211 U. S. 539, 547, 29 Sup. Ct. 206; Mr. Justice Lamar, in *Chicago M. & St. P. R. Co. v. Wisconsin* (1915) 238 U. S. 491, 501, 502, 35 Sup. Ct. 869; Mr. Justice McReynolds, in *Great Northern R. Co. v. Minnesota* (1914) 238 U. S. 340, 345, 35 Sup. Ct. 753.

regarded as within the fiscal clutch of the jurisdiction to which the person owes allegiance? Or, to put substantially the same question in another way, is the relation of the person to the territory of his choice such that he ought to contribute to the well-being of that territory according to his means, irrespective of the territorial source of those means, and of their liability to levy elsewhere? The answer to these questions can be extracted from no other source than considerations of what is deemed the best thing to do. No compelling metaphysic can furnish the solution of issues of policy. Words can be found to say that a tax on a person within the jurisdiction is a tax on a subject within the jurisdiction, no matter how the tax is measured. Other words can be found to say that the best way to find out what is really taxed is to know what determines the amount of the tax. Who shall arbitrate? The court has to do it as best it can. In general, your agreement or disagreement with the court will be determined by your relish or disrelish of the results which the court brings about.

Let us turn to what the court has to say for itself in the *Union Refrigerator Case*. After summarizing the facts, Mr. Justice Brown propounds the following doctrine:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law."³⁴

This is the so-called benefit theory of taxation. It expresses a view of policy held by some economic theorists. It is not, however, one of the dictates of constitutional law except with respect to special assessments. Mr. Justice Brown recognizes this when he points out later that "every citizen is bound to pay his proportion of a school tax, though he have no children, of a police tax, though he have no buildings or personal property to be guarded; or of a

³⁴(1905) 199 U. S. 194, 202, 26 Sup. Ct. 36.

road tax, though he never use the road."³⁵ Over against the benefit theory stands the ability theory, which also has its many votaries. There is certainly no agreement among doctors of economics that a tax on a person computed on the basis of his ability to pay is an unwarranted extortion. It would seem, therefore, that Mr. Justice Brown's initial flight does not get him far.

We come to the moving reason for the decision when we read the discussion of double taxation. The somewhat questionable statement is made that most modern legislation has been directed to the avoidance of double taxation.³⁶ A distinction is drawn between tangible and intangible property, in that the latter is held secretly, and is not readily taxable elsewhere than at the domicile of its owner. Tangible property, on the other hand, is more and more generally being taxed where it is, and when so taxable cannot evade its obligation. The consequences of taxing it where it is not, are graphically portrayed:

"The adoption of a general rule that tangible personal property in other States may be taxed at the domicile of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other States or even in foreign countries, of stocks of goods and merchandise kept at branch establishments *when already taxed at the state of their situs*, but of that enormous mass of personal property belonging to railways and other corporations, which might be taxed in the state where they are incorporated, though their charter contemplated the construction and operation of roads wholly outside the state, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection."³⁷

Clearly, it is the objection to double taxation that lies at the root of the Union Refrigerator Case. Clearly, too, the same economic interest bears a double burden, whether both taxes are called taxes on property or one is called a tax on the owner measured by the value of the property. Possibly this is so plain that the Supreme Court may be excused for not mentioning it. As

³⁵*Ibid.*, at p. 203. Mr. Justice Brown is aware, too, that "even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot." (*Ibid.*)

³⁶"Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation." (*Ibid.*)

³⁷*Ibid.*, at pp. 210-211. Italics are author's.

Professor Beale points out: "The court did not even notice the true nature of the tax, as a personal tax, not a tax on property, and in the actual case a tax on an artificial person, owing its very existence and its right to hold its property to the taxing state."³⁸

This so-called true nature of the tax seems to be largely a matter of words. If the lawmaker, in designating the object of his desire, is careful to name the taxpayer rather than his property, then the tax is a personal tax and not a tax on property. If, then, the person is within the jurisdiction, no question of extra-territoriality can arise. The amount of the tax and the methods of its admeasurement may be shocking, but nothing is taxed that is not present and within the control of the grasping treasury. This certainly was the idea that Mr. Justice Field had in *The Delaware Railroad Tax*.³⁹ But it is an idea that may easily lead to ridiculous results. John Wanamaker may have a million dollar stock of goods in Russia. Russia may benevolently leave him with technical title and tax him at the rate of one hundred per cent on the value of his property or take one hundred per cent of his income from sales thereof. Still, according to the theory of personal taxation, the City of Brotherly Love may tax its citizen for being a citizen and include in the measure of the tax the unhappy property in Russia. In the case supposed, an acute and kindly Philadelphia assessor might decide that the value of the Russian chattels was near the vanishing point. But if the Russian rate of levy were only twenty per cent, the assessor would give it less heed.

The difference between the two cases is one of degree. This does not mean that it is not a difference worth considering. But, since the rate of levy on the property where it is cannot be controlled by the jurisdiction where it is not, the propriety of any tax by the jurisdiction where it is not may well be determined in the light of the taxability of the property elsewhere, without regard to what that taxability may bring forth in any particular instance. The simple fact that the property is subject to the demands of the jurisdiction where it is located is enough to persuade us to avoid artificiality in determining whether it should enter into the assessment of other demands elsewhere. There is certainly artificiality in saying that what is taxed elsewhere is not the property but the person of its owner. Even on the theory of ability to pay, the owner has less ability to pay the so-called personal tax when he

³⁸32 Harvard Law Rev. 587, 592.

³⁹(1874) 85 U. S. 206, *supra*, pages 284, 285.

must pay in addition the property tax elsewhere. Possessions away from home are less valuable than those at home, if the former must help to support two governments while the latter may confine its benefactions to one. These are considerations which should make us tolerant towards the Supreme Court for silently and unostentatiously burying the notion that extra-state chattels may be included in the assessment of a personal tax on their owner, even though we might have welcomed some obsequies which manifested that the interment was not inadvertent.

If the personal tax theory were to flower in full bloom, it would authorize so-called personal assessments to be based on extra-state realty as well as on extra-state chattels. But, as Mr. Justice Brown points out, the notion has never been pushed to that extreme. "Indeed", he says, "we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state, much less where such action has been defended by any court."⁴⁰ And then he adds:

"It is said by this court in the *State Tax on Foreign-held Bonds Case*, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the state with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived."⁴¹

Granting that the Fourteenth Amendment authorizes the Supreme Court to subject the taxing powers of the states to restrictions from which they have previously been free, it is difficult to find any flaw in the insistence that extra-state chattels should be as inviolate as extra-state land.

All that militates against such identity of treatment is the ancient maxim *mobilia sequuntur personam* and its repeated recognition by the courts of the states. Mr. Justice Brown is skating over thin ice when he says that "cases holding that the

⁴⁰(1905) 199 U. S. 194, 204, 26 Sup. Ct. 36.

⁴¹*Ibid.*

maxim applies to tangible personal property" are "wholly exceptional."⁴² Nor is the ice much thicker under his statement that these cases "were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles and vessels engaged in navigation."⁴³ That the maxim originated long ago when chattels were likely to huddle close to their owners is of course true. That conditions are sufficiently different now so that time and lack of substantial sustenance should make the maxim decrepit is also free from doubt. But nevertheless the maxim was in more than moderately good and regular standing among state courts when Mr. Justice Brown was casting aspersions on it. What he and his colleagues did was to insist that this standing should continue no longer. They declared that a well-established rule of common law should henceforth be regarded as inconsistent with the requirements of due process of law. They themselves created the opportunity for the obituary that they wrote.

Such a judicial assassination undoubtedly demands justification. This may be found in the character of the deceased. If the maxim *mobilia sequuntur personam* pretends to speak in terms of physics, it cannot meet the test of veracity. Things which occupy physical space are where they are, and are not where they are not. If the maxim means only to say that chattels ought to be treated as though they were in the pocket of their owner, whether they are or not, the answer is that very often they cannot be so treated. They may indeed, if the courts allow, be subjected to the same burdens as chattels in the pocket of their owner, but they cannot always enjoy the same immunities. If they were in their owner's pocket, they could not be taxed in a jurisdiction to which that pocket was a stranger. If they have a fixed location apart from their owner, they are within the grasp of the tax gatherer within whose grasp they are, and to treat their owner as though this were not the fact is to discriminate against him in favor of owners whose eyes never leave their possessions. Now that the antique saying has lost its efficacy as a shield, it should not be permitted to serve as a sword. Circumstances which formerly may have made its physical falsity palatable have now ceased to exist.

If it is agreed that as a matter of wisdom the maxim should be laid to rest, the failure of state courts to appreciate the fact should

⁴²*Ibid.*, at p. 207.

⁴³*Ibid.*

not greatly hamper us. In matters which affect only the particular state in question, the judgment of state courts should have great and usually controlling weight with the Supreme Court of the United States. But when the question is whether a state is making raids into the territory of its neighbors, the Supreme Court should feel quite untrammelled and independent in forming its conclusions. In respect to all questions of jurisdiction, the Fourteenth Amendment is an instrument for the smooth working of the federal system. Only the Supreme Court of the United States is in the most favorable position to take a distinctly national view. With state courts, local interests must necessarily exercise a considerable and somewhat warping influence. The Supreme Court sees the competing interests of the different states. It sees the other side of the shield than that which may be presented by the particular litigation. It, too, is in a position to arbitrate between competing states. Each of two state courts may agree that double taxation is regrettable, but each may think that the blame does not belong at home. A court which is the common court of both states may exercise a maternal influence in drawing the line between them. Thus may the Supreme Court find justification for declaring that a long established rule of common law does not satisfy the requirements of due process of law.

That the reason for this judgment was judicial hostility to double taxation rather than any sudden appreciation of theoretical vices in long standing formulations, is apparent from the succeeding cases dealing with the taxability of movables that ride the seas. At the very same term in which the Union Refrigerator Case was decided, Mr. Justice White in *Ayer & Lord Tie Co. v. Kentucky*⁴⁴ thus stated the law as to the taxable situs of ships:

"The general rule has long been settled as to vessels plying between the ports of different states, engaged in the coastwise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrolment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority."⁴⁵

This exception in favor of taxability where there is what is called an actual situs had been affirmed the year before in *Old Dominion*

⁴⁴(1906) 202 U. S. 409, 26 Sup. Ct. 679.

⁴⁵*Ibid.*, at p. 421.

Steamship Co. v. Virginia,⁴⁶ in which vessels employed wholly in the waters of Virginia were held taxable in that state notwithstanding the facts that they were owned by a Delaware corporation and were enrolled outside of Virginia. Mr. Justice Brewer observed that "the general rule is that tangible personal property is subject to taxation by the state in which it is, no matter where the domicil of the owner may be."⁴⁷ He said nothing on the question whether the acquisition of a taxable situs elsewhere destroyed the possibility of taxation at the domicil of the owner. Nor was this discussed by Mr. Justice White in *Ayer & Lord Tie Co. v. Kentucky*.⁴⁸ The exception to which he refers in the passage already quoted⁴⁹ was in favor of taxability at the actual situs, with no mention of a corresponding exemption elsewhere. The Ayer Case held that enrolment in Kentucky did not make ships taxable there, when they were not permanently located there. The opinion stated that "enrolment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicil of the owner or the permanent situs of the property within the taxing jurisdiction."⁵⁰ This, though uttered six months after the decision in the Union Refrigerator Case, fails to state that taxability of ships at their actual situs carries with it exemption from taxation at the domicil of their owner.

Even now there is no explicit decision in the United States Supreme Court that the rule of the Union Refrigerator Case applies to ships. But plainly the court so regards it. For in *Southern Pacific Co. v. Kentucky*,⁵¹ decided in 1911, Mr. Justice Lurton says that the Old Dominion Case "affords an instance of where the domicil of the owner as a taxing situs was held to have been lost and a new taxing situs acquired by reason of a permanent location in another jurisdiction."⁵² As we have seen, the Old Dominion Case said nothing about the loss of a taxing situs at the domicil of the owner by the acquisition of an actual situs elsewhere. But what the case actually decided is less important than what the Supreme Court later thinks that it decided. Law is made

⁴⁶(1905) 198 U. S. 299, 25 Sup. Ct. 686.

⁴⁷*Ibid.*, at p. 305.

⁴⁸(1906) 202 U. S. 409, 26 Sup. Ct. 679, *supra*, page 296.

⁴⁹*Supra*, page 296.

⁵⁰(1905) 202 U. S. 409, 423, 26 Sup. Ct. 679.

⁵¹(1911) 222 U. S. 63, 32 Sup. Ct. 13.

⁵²*Ibid.*, at p. 72.

not only by being made but by being regarded as having been made. This, indeed, is a device frequently employed for the unmaking of law. Cases which profess to respect their forerunners, while finding ways of escape from their authority, are not infrequently treated later as having overruled what they purported to distinguish. Thus do rules of law shrink and expand. It seems clear that we may now regard it as settled that ships which remain within a jurisdiction so as to be taxable there cannot be taxed elsewhere. But it is equally clear that their exemption at the domicile of their owner is dependent upon their taxability elsewhere.

The Southern Pacific Case involved an attempt by Kentucky to tax ships owned by a Kentucky corporation though they were never in Kentucky. It appeared that the ships moved about so much that they could not be regarded as permanently located anywhere. For this reason the Kentucky court of appeals had held that they did not acquire any exemption from taxation at the domicile of their owner. The county court had taken a different attitude towards some barges, tugs and ferry boats which operated exclusively in some harbor in another state, thus acquiring a taxable situs there, and the Commonwealth had acquiesced in this decision.⁵³ Thus was lost the opportunity for an explicit decision on this point by the Supreme Court. But plainly enough the Supreme Court would have required the same result. For, in sustaining the taxability of the sea-going vessels at the domicile of their owner, Mr. Justice Lurton says:

"Since, therefore, an artificial situs for purposes of taxation is not acquired by enrolment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation, has its foundation in the protection which the owner receives from the government of his residence; and the exception to the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government."⁵⁴

The statement that the situs of the domicile must yield to the actual situs means that an artificial situs will not be assigned to the domicile when there is a real situs elsewhere. This, plus the

⁵³*Ibid.*, at p. 67, and *Commonwealth v. Southern Pacific Co.* (1909) 134 Ky. 417, 418, 120 S. W. 311.

⁵⁴(1911) 222 U. S. 63, 68, 32 Sup. Ct. 13.

recognition of an artificial situs in default of a real one, shows that the sole concern of the Supreme Court in the cases here reviewed is the prevention of double taxation by the action of different states. No abstract or theoretical considerations disturb Mr. Justice Lurton in holding that ships sometimes have a taxable situs at the domicil of their owner and sometimes do not. He is not even concerned to declare that taxation by the jurisdiction of domicil is not of the ships but of their owner. The ship itself is said to have a situs at the domicil of its owner provided it has no situs elsewhere. Of course this use of the term "situs" is merely a way of expressing a result. Situs, as used by the court, does not mean location. It does not express a physical fact. It is a way of saying that under certain circumstances the court will permit a ship to be taxed where the owner lives. Instead of saying that it may be taxed there because it has a situs there, it would be more accurate to affirm that it has a situs there because it may there be taxed. The legal imagery indulged in by the term situs is like that involved in the expression that a debt is or is not merged in a judgment. If a court thinks that a debt should be given some recognition even though a judgment has been obtained thereon, it says that the debt has not been merged in the judgment.⁵⁵ If it thinks that only the judgment should be given recognition, it declares that there has been a merger. But this *usus loquendi* belongs to the tongue, not of chemistry, but of legal alchemy. What purports to be a reason is only saying the same thing in other terms. Mr. Justice Lurton practically gives the secret away when he makes the distinction between an artificial situs and an actual one.

What most concerns us are the reasons given why the results reached are thought desirable. As the aversion to double taxation underlies the Union Refrigerator Case, so the disrelish of complete escape from taxation explains the Southern Pacific Case. It is felt that ships should not because of their vagrant ways escape from making any contribution to any public fisc. It is evidently with the remarks⁵⁶ of Mr. Justice Brown in the Union Refrigerator Case in mind that Mr. Justice Lurton says:

"The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the

⁵⁵See, for example, *Eastern Township Bank v. H. S. Beebe & Co.* (1880) 53 Vt. 177.

⁵⁶Quoted *supra*, page 291.

general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been such flagrant abuse as may be remedied by some affirmative principle of constitutional law.

Take the case in hand. The Southern Pacific Company is a corporation having much extraordinary power. It only exists and exercises this power by virtue of the law of Kentucky. By the law of its being it resides in Kentucky, and there maintains its general office, and there holds its corporate meetings. To say that the protection which the corporation receives from the state of its origin and domicil affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law."⁵⁷

Thus the equivalence of benefit and burden, which Mr. Justice Brown thought so essential to the validity of taxation, retires into the background when property is likely to escape from taxation altogether if it is not reached where its owner lives. So the protection given to the owner is thought sufficient justification for taxation on his absent chattels that are sufficiently peripatetic to avoid taxation elsewhere. The owner should not fail to render tribute unto at least one Cæsar, even though no Cæsar rules the waves and guards his galleons.

The Southern Pacific Company of course relied on the Union Refrigerator Case, but Mr. Justice Lurton answered:

"The question for decision in that case, as stated in the forepart of the opinion, was, 'whether a corporation organized under the law of Kentucky is subject to taxation upon its property *permanently located in other states*, and employed there in the prosecution of its business'. The property in question was railroad cars, a kind of movables obviously capable of acquiring a permanent location other than that of their owner. The judgment of the court was that the taxation of such property so *permanently located* elsewhere by the law of the domicil of the owner would be a denial of due process of law, and beyond the power of the state. . . . That judgment did not deny to the state of the domicil of the owner power to tax tangibles which had not acquired an actual situs elsewhere."⁵⁸

But ships are different from freight cars. "To lay down a principle that vessel property has no situs for purposes of taxation

⁵⁷(1911) 222 U. S. 63, 76, 32 Sup. Ct. 13.

⁵⁸*Ibid.*, at p. 74. The italics are those of Mr. Justice Lurton.

other than that of actual permanent location would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property."⁵⁹ Cars and cattle may readily "become a part of the permanent mass of property in a particular state", but a ship is a pilgrim whose "stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation."⁶⁰ For practical purposes these nomads of the seas have the same low visibility that characterizes intangible property. "The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper situs for purposes of taxation."⁶¹ So should it be with ships. Undaunted by the contention of Messrs. Humphrey and Evarts that some of the ships of the Southern Pacific Company could touch at no port in Kentucky, Mr. Justice Lurton answered that it did not matter. Even Kansas, it appears, might be the "situs" of ocean greyhounds, for the learned Justice says:

"But the test proposed is not one for which there is any authority, and would but introduce another grave element of uncertainty, dependent upon the draught of the ships and the depth of the water. Such a test might exclude from taxation ships, such great ships as the *Olympic* or the *Lusitania*, while smaller craft might meet the proposed standard."⁶²

Thus runs the argument. It seems a long rigmarole for saying that the conceptions of fairness and wisdom which wear the habiliments of due process of law forbid the taxation of chattels at the domicil of their owner if they are likely to be taxed elsewhere, but permit such taxation if otherwise they are likely to go free. Possibly it would not do for the court to say this and nothing more. It might not befit the so-called majesty of the law. Every art or discipline has its ideology which devotees chant to the mystification of the uninitiated. The practice is so well established that one would not lightly advocate its abrupt abandonment. But these ideological expositions should not be taken too seriously as expressions of final and all-inclusive truth. Yet that they have their place can not in view of the patent fact be denied. While one would

⁵⁹*Ibid.*, at pp. 74-75.

⁶⁰*Ibid.*, at p. 75.

⁶¹*Ibid.*, at p. 76.

⁶²*Ibid.*, at p. 77.

gladly except most of the judges who have sat on our high tribunal from the charge of Alexander Hamilton that man is a reasoning rather than a reasonable being, yet it must be said of most of them that they deem it their duty to clothe their reasonableness in thick garments of reasoning. Tradition comes to their support in justifying the practice of indulging in copious reasoning which often adds little, if anything, to the light that would be shed by the brief statement that the decision was reached because it was thought to be the most reasonable one of the several possibilities that presented themselves.

This indulgence in reasoning which adds no substantial support to the decision would be innocuous enough if we were interested only in the particular case which evokes it. The trouble comes when we strive to articulate the reasoning in one case with that in another. The pain which such efforts engender is familiar to all students of the law. Not infrequently it is a comfort to view the cases, not as the product of a coherent and consistent doctrine, but as a series of separate and only partially related efforts to reach wise practical adjustments of very practical issues. This approach reveals that quite commonly judges are to be highly commended for their reasonableness, even when their reasoning is most unsatisfactory. It shows, too, that the reasoning can seldom, if ever, be so compelling as to require us to forgive any decision for wanton disregard of the dictates of reasonableness. This is particularly true when we are dealing with the application of constitutional limitations which content themselves with affirming the existence of boundaries and refrain from delineating them. We may therefore with propriety urge that the undesirability of double taxation which has been accepted as a canon of judicial action in testing the constitutionality of property taxation should be accorded its deserved weight in dealing with the problem of extra-territorial inheritance taxation, notwithstanding any abstract or theoretical distinctions between the different forms of taxation which reasoning persons may draw.

That the law which has been reviewed is not regarded by the Supreme Court as automatically applicable to inheritance taxation is explicitly stated by Mr. Justice Brown in the *Union Refrigerator Case*. In the paragraph which immediately precedes his conclusion, he says:

"It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of in-

heritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations."⁶³

The different consideration regarded as controlling in the case of intangibles has already been touched upon. It is the likelihood that intangibles will escape taxation altogether if they are not reached at the domicil of their owner. Yet, even when this possibility of escape is foreclosed, the grasp of the tax collector at the owner's domicil will not be frustrated by the Supreme Court. This was held in *Fidelity & Columbia Trust Co. v. Louisville*,⁶⁴ decided in 1917, where deposits in a Missouri bank, which were by way of hypothesis conceded to be taxable in Missouri, were held taxable also in Kentucky where their owner was domiciled. In so far as the decision proceeds on the theory of the enjoyment by the deposits themselves of a situs at the domicil of their owner, attention will be paid to it in the succeeding section dealing with jurisdiction over property. For our present purpose it is important to note Mr. Justice Holmes' affirmation of the personal-tax theory. After saying that "liability to taxation in one state does not necessarily exclude liability in another"⁶⁵ and referring to cases dealing with stock in corporations, this acute and usually realistic judge proceeds:

"The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority, we see nothing to hinder the state from taking a man's credits into account. But, so far from being declared unlawful, it has been decided by this court that whether the state shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the state's affair, not to be interfered with by the United States, and therefore that a state may tax a man for a debt due from a resident of another state."⁶⁶

This is disturbing. The justification for the tax as one on the person, notwithstanding the recognition of the same economic interest as a taxable *res* elsewhere, is one that seems equally appli-

⁶³(1905) 199 U. S. 194, 211, 26 Sup. Ct. 36.

⁶⁴(1917) 245 U. S. 54, 38 Sup. Ct. 40.

⁶⁵*Ibid.*, at p. 58.

⁶⁶*Ibid.*

cable to the assessment of foreign land and foreign chattels. As a justification, it cannot justify. But no one can question that the decision has long practice and precedent to support it. The Supreme Court made new law in the case of chattels, but refuses to extend the new departure to intangibles even in a case where it was conceded that they were taxable elsewhere than at the domicile of their owner. It is to be regretted that the opinion contented itself with theory and authority, and did not offer substantial justifications. For the reasons of policy which require the exemption of chattels from taxation at the domicile of their owner, when they are taxable where they are, would seem at first glance to apply to the exemption of debts under similar circumstances. This is evidently the judgment of Chief Justice White, for he announced his dissent from the Fidelity decision. But the majority, speaking through Mr. Justice Holmes, says only that "this court has not attempted to press the principle so far, and there is opposed to it the long-established practice of considering the debts due to a man in determining his wealth at his domicile for the purpose of this sort of tax,"⁸⁷ So there is. But there was also the long-established practice of dealing with chattels in the same way. To that practice the Supreme Court put an end. The issue in the Fidelity Case would seem to be, not whether the Supreme Court had already attempted to press the principle of the Union Refrigerator Case to a similar application to debts, but whether the principle does not in reasonableness apply to debts that subject the owner to tribute at the abode of the debtor.

The hint that the reasonableness of the decision in the Fidelity Case does not appear from the opinion involves no implication that such reasonableness cannot be discovered. Before embarking on such a voyage of discovery, it will be well to have in mind a somewhat similar case with respect to chattels, to which the Union Refrigerator Case was held not to apply. This was *New York ex rel. New York Central & H. R. R. Co. v. Miller*,⁸⁸ decided in 1906. Under the New York franchise-tax law, it was necessary to discover what proportion of the capital of the relator was employed within the state. The New York court had refused to make any deduction because of extra-state wanderings of cars which had their headquarters in New York. In sustaining this, Mr. Justice Holmes said:

⁸⁷*Ibid.*, at p. 59.

⁸⁸(1906) 202 U. S. 584, 26 Sup. Ct. 714.

"Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the state. . . . But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts."⁶⁹

Mr. Justice Holmes thought that these excursions were not of a character to make the cars taxable in other states and that therefore the court need not consider "whether there is any necessary parallelism between liability elsewhere and immunity at home."⁷⁰ But the slant of the opinion indicates that the court would not have decided differently had it been clearly established that a proportion of the car property was taxable outside of the home state. This, however, is a psychological, and not a logical, inference; and the court left open a way for a different decision when the question arises so that it cannot be dodged. If, however, our inference is correct, the Miller Case means that chattels which are at some time during the taxable year at the domicil of their owner are taxable there, no matter how much they wander from their own fireside, or whether that wandering gets them into the clutches of the Matthews of other states.

Thus both the Miller Case and the Fidelity Case represent a refusal to recognize the Union Refrigerator Case as a sure preventive against bi-state double taxation. The only firmly established impairment of the efficacy of the maxim *mobilia sequuntur personam* is the cutting of the link between the owner and his chattels which never visit him at his domicil and which, in addition, get a sufficiently fixed location elsewhere to be taxable there. We return, then, to the quest for the practical justifications for drawing the line here. We may posit first the *desideratum* of at least one tax on every economic interest. It is more important that none should escape than that none should be taxed twice. Debts are exceedingly likely to go free unless they are reached at the domicil of the creditor. Notwithstanding accompaniments which

⁶⁹*Ibid.*, at pp. 596-597.

⁷⁰*Ibid.*, at p. 598.

make them taxable elsewhere, they are apt to go undetected. The same is true of cars whose trips away from home are irregular. If an allowance were to be made for these spasmodic absences, it would raise difficult questions of computation. The variability of the circumstances under which such temporary absences would make the absentees taxable elsewhere, and of the circumstances under which intangibles might be reached apart from their owner, would bring to the courts a flood of cases, each dependent on its special facts. Some sacrifice of ideal results must be made for the sake of attaining a convenient and workable fairly general rule. There is also something to the personal-tax theory. The advantages of living within a jurisdiction cost money, and those who enjoy the advantages ought to help pay for them. Their ability to pay is a factor to be considered in fixing their proper share. Certainly they ought not to escape altogether by placing the more tangible indicia of their means elsewhere. Their home town has a just claim to their support. If that town is prevented from drawing sustenance from extra-state chattels which have a fixed location elsewhere, it may appeal to the judgment of Solomon in favor of aid from other chattels not so domesticated in other jurisdictions. If it has lost part of the loaf which the common law gave it, it has a worthy claim to keep the rest. If in one close case the umpire has decided against it, in the next he should lean in its favor. Its fiscal needs are entitled to as much consideration as are the interests of its residents. There is something to be said in favor of long established practices, notwithstanding the artificiality with which those practices have commonly been justified. The artificiality could hardly have maintained itself so long had it not been the vehicle for conveying some modicum of fairly acceptable results.

This brings us back to Mr. Justice Brown's statement in the *Union Refrigerator Case* that inheritance or succession taxes, as well as taxes on intangible property, are controlled by different considerations from those governing the taxation of chattels. What those considerations are will be discussed more particularly when we return to the subject of inheritance taxes. The most important of them is doubtless the conception of inheritance as a matter of privilege. What weight should be given to this can best be considered after we have dealt with the cases which show that privilege taxes are no longer immune from judicial censorship for the vice of extra-territoriality. It should here be noted, however, that this vice has thus far been discovered only in taxes im-

posed by other jurisdictions than that of the domicil of the person affected.⁷¹ It is likely, therefore, that the decisions which have found privilege taxes too grasping can be brought to bear on inheritance taxes only to the extent that they are demanded by jurisdictions in which the deceased was not domiciled. It is apparent, too, that the cases on property taxation which have been here reviewed can proffer but limited relief against inheritance taxes imposed by the jurisdiction where the deceased was domiciled. That relief will at best be confined to the exclusion from the reckoning of chattels which have a fixed location outside the jurisdiction of domicil. Nor is even this relief likely to be granted. But if, as an original proposition, there are considerations which militate strongly in favor of granting it, there is a good basis on which to urge legislatures to stay their hand even though no court would compel them to do so. A tax which is not found unconstitutional may still be adjudged unwise.

(To be continued)

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⁷¹In *Kansas City, etc. R. Co. v. Stiles* (1916) 242 U. S. 111, 37 Sup. Ct. 58, the Supreme Court refused to relieve a domestic corporation from an excise measured by total capital stock representing property without as well as within the State. The decision, however, is bottomed largely on the ground that the law imposing the excise was in force when the charter of incorporation was granted and the corporation accepted the privilege with the burden annexed.

Note should be taken also of the series of cases interpreting and sustaining the federal excise on the use of foreign built yachts. *Billings v. United States* (1914) 232 U. S. 261, 34 Sup. Ct. 421; *Pierce v. United States* (1914) 232 U. S. 290, 34 Sup. Ct. 427; *United States v. Goelet* (1914) 232 U. S. 293, 34 Sup. Ct. 431; *United States v. Bennett* (1914) 232 U. S. 299, 34 Sup. Ct. 433; *Rainey v. United States* (1914) 232 U. S. 310, 34 Sup. Ct. 429. The statute was construed not to tax the use of a foreign built yacht by a citizen of the United States domiciled outside the United States, but it was held to apply to the use of a yacht entirely outside the United States by a domiciled citizen. It was stated that the power to tax such use by a citizen not domiciled in the United States was not questioned. The bearing of these cases on the power of the United States to impose inheritance or succession taxes will be considered later. Their application to the problem of state inheritance taxation is restricted by the declaration of the Chief Justice that the rule that power to tax depends upon jurisdiction over the subject taxed is confined to taxation by the state governments.

Attention must be paid also to the fact that it seems to be assumed that an income tax imposed on a person at his domicil may be measured by income from extra-state sources. See the passage quoted from the *Union Refrigerator Case* on page 294, *supra*, and *Shaffer v. Carter* (U. S. Sup. Ct., October Term, 1919, No. 531, March 1, 1920) pp. 11-12 of pamphlet issued by the Clerk of the Court.

These decisions and doctrines will be considered more fully in the section dealing with taxes on privileges.